1999 HOUSE JUDICIARY

HB 1387

1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. 1387

House Judiciary Committee

❑ Conference Committee

Hearing Date : February 2, 1999

Tape Number	Side A	Side B	Meter #
1	X		0
Committee Clerk Signature			

Minutes:

KEN OLSON (NDPIA) Our association has 285 professional insurance agent members. We are looking for a way to address rising legal costs. This is a "loser pay" bill and it was introduced last session. It is an attempt to get fairness in the system from the insurance industry perspective. I could give you example after example where the insurance company wins the suit and still is stuck with huge legal bills.

ROB HOVLAND (Pres, Center Mutual Ins. Co.) I would support this bill, if it is amended. I was a practicing lawyer for 9 years and represented plaintiffs and defendants. I would suggest we adopt a system where a plaintiff, at the time of filing his action, also files a statement indicating the least he will settle for, and the defendant file its greatest offer with its answer. Then, if amount recovered is outside those parameters, the party whose offer to settle was greater or less than that amount given, pays the others costs. lIf the recovery is between those amounts

each side pays its own costs. There should be a cap on fees. Also, you shouldn't have to actually file suit, you could set it up to be a "Notice of Claim". Hawaii has a system where all auto accident case go to arbitration, and if a party isn't satisfied they can appeal to a jury. If they do not do at least 20% better, they have to pay the others fees and costs.

SANDI TABOR (SBAND) The Bar Association opposes this bill. Our president, Dann Greenwood will speak to the specifics.

DANN GREENWOOD (Pres, SBAND) Presented written testimony, a copy of which is attached.

BLAINE NORDWALL (Hum Ser) Human Services is concerned about the impact this bill will have on domestic disputes. The bill seems to require that there be a winner and a loser. In divorces the plaintiff will always be the winner, since the divorce is granted. If the committee approves this bill I ask that you take domestic relations out.

RICHARD HAMMOND I oppose this bill. It will make our legal system less available to the little guy, when it should be more accessible.

COURTNEY KOBELE (NDTLA) Presented written testimony in opposition to the bill, a copy of which is attached.

SEBOLD VETTER (CARE) We have a lot of poor members and this would be a hardship on them. The small guy needs his chance too.

BOB BOLINSKE (Bismarck Attorney) I was a defense lawyer for 25 years representing insurance companies and for the last 5 years have represented plaintiffs. I recently had a case where a nursing home insurance company refused to pay on its policy and was blatantly wrong. I had 10 clients and if this bill were law none of them would have taken the chance on having to

pay the company's lawyer. But we did proceed and won and they all are getting what is rightfully theirs. Also, I believe this would increase litigation as lawyers would sue out cases they won't now because the recovery wouldn't cover fees.

COMMITTEE ACTION February 3, 1999

REP. MARAGOS moved that the committee recommend that the bill DO NOT PASS. Rep. Delmore seconded and the motion carried on a roll call vote with 14 ayes, 0 nays and 1 absent. Rep. Gunter was assigned to carry the bill on the floor.

Date: 2/3
Roll Call Vote #: 1

1999 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1387

House JUDICIARY Committee

☐ Subcommittee on _____
or
☐ Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Not pass

Motion Made By Maragos Seconded By Delmore

Representatives	Yes	No	Representatives	Yes	No
REP. DEKREY	✓		REP. KELSH	✓	
REP. CLEARY	✓		REP. KLEMIN	✓	
REP. DELMORE	✓		REP. KOPPELMAN	✓	
REP. DISRUD	✓		REP. MAHONEY	✓	
REP. FAIRFIELD			REP. MARAGOS	✓	
REP. GORDER	✓		REP. MEYER	✓	
REP. GUNTER	✓		REP. SVEEN	✓	
REP. HAWKEN	✓				

Total Yes 14 No 0

Absent 1

Floor Assignment [illegible] K. Gunter

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1387: Judiciary Committee (Rep. DeKrey, Chairman) recommends **DO NOT PASS** (14 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). HB 1387 was placed on the Eleventh order on the calendar.

1999 TESTIMONY

HB 1387

Ken Olson 1387

Underwriting and Operating Ratios by Line and by State 1996

State	P.P. Auto Liability				State	P.P. Auto Physical Damage			
	Und. Profit		Oper. Profit			Und. Profit		Oper. Profit	
	1996	1992-1996	1996	1992-1996		1996	1992-1996	1996	1992-1996
Hawaii	20.7%	3.9%	21.2%	10.2%	New Jersey	26.8%	23.2%	18.9%	16.5%
California	12.3	6.1	13.9	10.8	Hawaii	22.1	19.1	15.7	13.7
Texas	10.0	-4.1	11.4	2.5	Rhode Island	18.0	26.2	13.2	18.4
Rhode Island	8.2	2.7	13.8	10.9	Alaska	16.5	19.8	11.9	13.9
Alaska	7.9	-5.5	11.7	2.4	New York	13.7	14.5	10.3	10.8
Missouri	5.7	-0.9	8.9	4.8	Georgia	11.5	14.6	8.8	10.6
Connecticut	4.6	-4.7	12.6	6.4	Connecticut	10.4	12.2	8.1	9.3
Minnesota	4.2	-3.2	10.0	5.6	California	5.3	8.7	5.0	7.1
Maryland	3.7	3.7	9.0	9.1	New Mexico	4.6	11.7	4.4	8.9
Idaho	3.4	-3.9	8.0	3.1	Idaho	4.5	11.2	4.4	8.5
Florida	3.1	-3.2	8.0	4.3	Nevada	4.3	12.9	4.3	9.7
Colorado	2.8	-1.6	7.5	4.8	Vermont	4.3	16.1	4.3	11.8
Kansas	2.2	-2.5	6.3	3.5	Colorado	4.0	10.5	4.0	8.1
New York	1.8	-10.4	10.1	2.6	New Hampshire	3.9	16.3	4.2	12.1
Virginia	1.8	0.2	7.3	6.4	Delaware	3.7	14.2	3.9	10.7
Michigan*	1.0	5.2	17.7	19.4	Montana	1.9	8.6	2.6	6.8
Arkansas	0.9	-5.1	5.0	1.3	Kansas	1.2	-15.0	2.1	-8.7
D.C.	0.9	-6.1	8.2	4.1	Maryland	0.7	4.3	1.8	4.2
New Mexico	0.9	-8.7	6.7	0.7	Florida	0.6	-6.0	1.8	-2.5
Maine	0.3	-2.3	8.3	6.1	Ohio	0.4	7.6	1.7	6.2
Massachusetts	0.3	3.8	7.9	10.0	Maine	-0.2	14.2	1.3	10.6
Iowa	0.1	-3.7	6.0	3.6	Missouri	-0.5	4.2	0.9	3.8
Ohio	0.1	-4.2	6.5	4.0	Utah	-0.8	9.6	0.9	7.4
Wisconsin	-0.4	-3.1	7.2	5.5	Alabama	-1.0	8.4	0.6	6.6
Illinois	-0.5	-7.5	7.0	2.6	Wyoming	-1.0	11.0	0.7	8.4
Utah	-0.7	-5.1	4.9	2.1	West Virginia	-1.1	10.3	0.6	7.9
New Hampshire	-0.9	-1.7	7.6	7.4	D.C.	-1.8	7.5	0.4	6.4
Oklahoma	-0.9	-8.5	4.2	-0.5	Arizona	-2.1	-0.4	0.1	1.0
West Virginia	-0.9	-11.2	5.6	-0.5	Illinois	-2.3	8.6	-0.1	6.9
Arizona	-1.1	-3.0	5.1	3.9	Pennsylvania	-2.7	8.2	-0.3	6.8
Oregon	-1.7	1.4	4.5	6.1	Wisconsin	-2.8	4.9	-0.5	4.4
Alabama	-1.9	-5.6	3.6	1.4	Oklahoma	-3.3	8.0	-0.8	6.3
Indiana	-1.9	-4.8	4.7	2.8	Washington	-4.8	7.5	-1.6	6.1
Mississippi	-1.9	-2.2	3.6	3.5	Oregon	-5.0	4.5	-1.8	4.2
Vermont	-2.2	-9.9	7.1	2.2	Tennessee	-5.2	4.5	-1.9	4.3
North Carolina	-2.4	-4.0	3.7	3.0	Louisiana	-6.2	0.6	-2.7	1.6
South Dakota	-2.5	-14.8	5.5	-2.4	Virginia	-8.4	2.4	-4.1	2.9
Washington	-2.6	-4.0	5.2	4.1	Mississippi	-8.6	2.8	-4.2	3.1
Pennsylvania	-2.7	-5.9	7.6	6.1	Texas	-8.7	-0.2	-4.1	1.3
Tennessee	-4.4	-6.3	2.5	1.4	Kentucky	-9.3	4.1	-4.7	3.9
Puerto Rico	-4.8	-12.7	2.5	-2.6	Iowa	-9.4	3.0	-4.7	3.2
Montana	-5.1	-10.9	3.1	-1.0	Michigan	-12.5	1.0	-6.6	2.0
Louisiana	-5.7	-2.2	1.7	4.1	Minnesota	-13.1	1.3	-7.1	2.1
North Dakota	-7.2	-7.9	2.2	1.9	South Dakota	-14.4	-3.5	-8.0	-1.1
Nevada	-7.9	-16.2	0.9	-4.4	Indiana	-14.5	5.2	-8.1	4.6
Delaware	-8.3	-8.9	2.7	2.6	Massachusetts	-17.0	1.4	-9.6	2.4
Nebraska	-11.0	-7.8	-0.6	1.2	Puerto Rico	-17.1	-8.8	-2.7	2.2
Georgia	-12.8	-15.5	-3.0	-4.7	South Carolina	-17.1	-3.4	-9.6	-0.7
Kentucky	-13.0	-15.2	-2.4	-3.9	Arkansas	-20.0	-0.6	-11.7	0.8
Wyoming	-13.3	-12.1	-2.9	-2.4	North Dakota	-25.8	-13.8	-15.3	-7.7
South Carolina	-18.6	-16.9	-6.2	-5.1	Nebraska	-27.3	-3.7	-16.3	-1.1
New Jersey	-29.3	-31.2	-6.0	-8.6	North Carolina	-39.7	-9.5	-24.4	-4.9
Countrywide	**0.4%**	**-4.4%**	**7.4%**	**4.5%**	**Countrywide**	**-1.4%**	**6.0%**	**0.6%**	**5.3%**

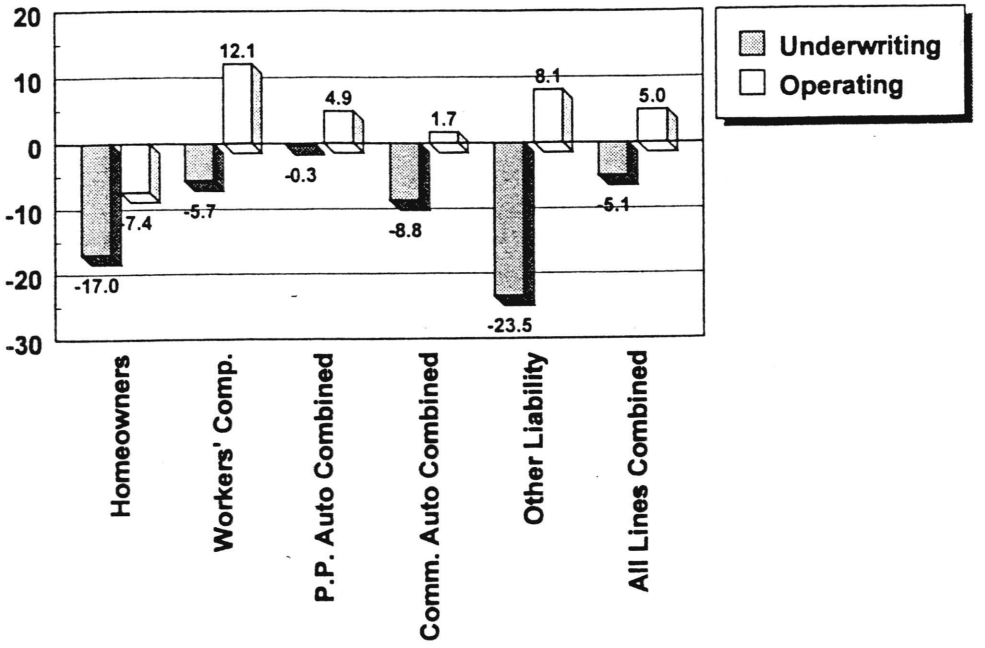
* Michigan figures reflect the inclusion of the Michigan Catastrophic Claims Association data. Since assessments and premiums are indistinguishable, profitability results may be misleading due to the difficulty in identifying losses related to MCCA transactions.

Note: Underwriting and Operating Ratios are presented as percentages of earned premium.

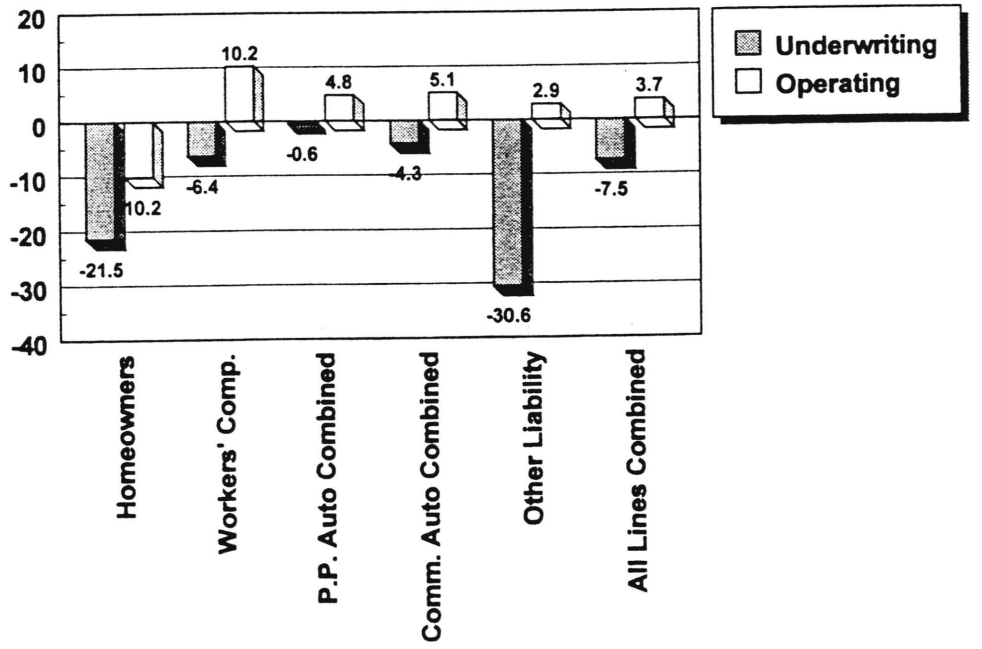
Source: NAII, based on data from National Association of Insurance Commissioners, **Report on Profitability By Line By State**

Underwriting & Operating Ratios (as Percentages of Earned Premium)

1996



1992 - 1996 Combined



Loss Ratios and Combined Ratios by Line and by State 1997

	Other Liability (including Product Liability)			All Lines Combined		
	L/R	C/R	Rank	L/R	C/R	Rank
Alabama	100.0%	142.7%	16	65.1%	105.2%	15
Alaska	93.7	136.4	28	54.8	94.9	46
Arizona	94.2	136.9	25	62.9	103.0	19
Arkansas	92.7	135.4	30	66.8	106.9	12
California	104.5	147.2	4	58.8	98.9	34
Colorado	109.2	151.9	3	53.7	93.8	48
Connecticut	97.0	139.7	18	55.5	95.6	45
Delaware	121.4	164.1	1	69.3	109.4	6
Dist of Col.	100.1	142.8	15	46.8	86.9	51
Florida	94.7	137.4	23	54.8	94.9	47
Georgia	102.7	145.4	7	58.5	98.6	37
Hawaii	93.2	135.9	29	36.9	77.0	52
Idaho	93.8	136.5	27	61.7	101.8	23
Illinois	92.3	135.0	32	59.1	99.2	32
Indiana	96.8	139.5	19	67.2	107.3	9
Iowa	90.0	132.7	37	60.5	100.6	28
Kansas	68.7	111.4	48	56.1	96.2	43
Kentucky	102.9	145.6	6	72.9	113.0	2
Louisiana	95.8	138.5	20	61.6	101.7	24
Maine	100.6	143.3	11	50.3	90.4	50
Maryland	51.0	93.7	50	58.5	98.6	36
Massachusetts	102.2	144.9	8	56.5	96.6	41
Michigan	72.7	115.4	46	65.7	105.8	14
Minnesota	89.9	132.6	38	66.4	106.5	13
Mississippi	100.1	142.8	14	62.9	103.0	18
Missouri	85.5	128.2	43	58.0	98.1	38
Montana	-184.9	(142.2	52	63.0	103.1	17
Nebraska	68.5	111.2	49	60.7	100.8	27
Nevada	101.7	144.4	10	70.7	110.8	3
New Hampshire	88.5	131.2	41	55.5	95.6	44
New Jersey	95.7	138.4	21	67.1	107.2	10
New Mexico	72.1	114.8	47	52.2	92.3	49
New York	101.9	144.6	9	62.3	102.4	21
North Carolina	82.0	124.7	45	61.4	101.5	25
North Dakota	103.5	146.2	5	123.0	163.1	1
Ohio	94.6	137.3	24	69.6	109.7	5
Oklahoma	91.5	134.2	33	59.4	99.5	30
Oregon	90.2	132.9	36	60.8	100.9	26
Pennsylvania	115.4	158.1	2	67.0	107.1	11
Puerto Rico	49.5	92.2	51	56.7	96.8	40
Rhode Island	100.3	143.0	13	58.5	98.6	35
South Carolina	91.4	134.1	34	63.7	103.8	16
South Dakota	90.9	133.6	35	67.8	107.9	8
Tennessee	88.6	131.3	40	62.0	102.1	22
Texas	100.6	143.3	12	57.8	97.9	39
Utah	92.6	135.3	31	58.8	98.9	33
Vermont	95.0	137.7	22	68.3	108.4	7
Virginia	86.9	129.6	42	59.2	99.3	31
Washington	98.4	141.1	17	69.8	109.9	4
West Virginia	93.9	136.6	26	62.4	102.5	20
Wisconsin	89.3	132.0	39	60.5	100.6	29
Wyoming	84.1	126.8	44	56.1	96.2	42
Countrywide	**96.9%**	**139.6%**		**61.4%**	**101.5%**	

Notes: 1) "All Lines Combined" includes all lines indicated in the Annual Statement. 2) Loss ratios exclude loss adjustment expenses. They are adjusted by dividends to policyholders. Combined ratios are calculated as the sum of the loss ratios, countrywide loss adjustment expense ratios and countrywide underwriting expense ratios. Loss and loss adjustment expense ratios are based on direct premiums earned, while underwriting expense ratios are based on direct premiums written.

Source: National Association of Independent Insurers, using data compiled by OneSource (NAIC) and A.M. Best Company

Testimony of Dann Greenwood
State Bar Association of North Dakota
HB 1387

Hello. My name is Dann Greenwood. I have the distinct honor and privilege to serve as the current President of the State Bar Association of North Dakota.

First of all, I would like to thank you for allowing the State Bar Association the opportunity to speak to your Committee today.

In my role as President of the State Bar Association, I represent the more than 1400 practicing attorneys in the state of North Dakota. Very obviously, the work of this committee in general, and HB 1387 in particular, is of interest to the members of our association as well as their current and future clients.

The purpose for my appearance here today is to voice the opposition of the State Bar Association of North Dakota to HB 1387; and to urge that your Committee give a "do not pass" recommendation to the full House of Representatives.

For your information, the Bar Association maintains a Legislative Committee whose function it is to closely monitor proposed legislation and give recommendations to the Board of Governors for the Association about what, if any, position the Association should take on that legislation. That committee is made up of Judges and very experienced and highly respected attorneys from around the State with varied clientele including both small and big business, low income clients, labor interests and others. After giving it careful consideration, it was the recommendation of the Legislative Committee that the Association oppose this proposed legislation.

In turn, the Board of Governors for the Association considered HB 1387, both on the basis of the recommendation of the Legislative Committee and after its own consideration. Like the Legislative Committee, the Board of Governors is made up of very experienced and highly respected attorneys from around the State with equally varied clientele. And likewise, the Board of Governors, of which I am a participating member, unanimously concluded that the Association should oppose this proposed legislation.

I would be happy to provide the Committe with the names of the members of the Committee and the Board of Governors if you wish.

I should explain to you that the position of the President of the Association is purely representative. I do not have any greater authority to speak for the Association than that which is specifically given to me. In that context, I must tell you that neither the Legislative Committee nor the Board of Governors gave specific explanation of the reasons for their respective positions. Therefore, while I believe I have a good "sense" of the Association's position, what I say to you today is just that, my "sense" of the Association's reasons for its opposition.

It is the Bar Association's perception that this legislation is intended more to reduce what is viewed as an abundance of "frivolous" litigation than to address any other concern. In that context, it is the position of the Bar Association that HB 1387 is very simply unnecessary. First, I would dispute the suggestion that frivolous litigation abounds. Second, I would suggest that there aready exist a number of significant methods for protecting against that concern.

DINN GREENWOOD

First of all, NDCC § 28-26-01, in its present form, gives the Court sufficient power and authority to award costs, including reasonable attorney fees, to the prevailing party in the event that it determines that the other party has interposed frivolous pleadings.

In addition, a second statute, NDCC § 28-26-31, gives the Court the power to award costs, including attorney fees, where it determines that a party has interposed pleadings without reasonable cause, not in good faith and found to be untrue.

Those two(2) statutes provide a means of imposing a direct and substantial penalty upon any party who advances a frivolous lawsuit or frivolous argument.

The Judicial system has also already promulgated numerous additional means to protect against frivolous litigation. While some of those measures are applicable to the parties, a number are also directed toward or against the action of an attorney that might foster or permit frivolous actions or arguments.

For instance, Rule 11 of the North Dakota Rules of Civil Procedure imposes a rather strident requirement that attorneys not advocate or condone untrue or frivolous arguments or claims; and it allows the Court to impose rather stiff sanctions, including attorney fees, directly against both the party and the attorney in instances where the rule is violated.

Also, Rule 16 of the North Dakota Rules of Civil Procedure addresses the power of the Court at the Pre-trial stage to take appropriate action to eliminate frivolous claims or defenses.

Furthermore, as concerns attorneys, Rule 3.1 of the North Dakota Rules of Professional Conduct, otherwise known as the Rules of Ethics, provides that "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Violation of that Rule can result in sanctions as severe as disbarment.

There are additional, and more practical, reasons why most attorneys have no incentive to participate in frivolous litigation.

In instances where an attorney is working on what is refered to as a "contingent fee" arrangement where the fee is a percentage of the recovery, the attorney simply cannot afford to pursue a frivolous case. If it truly is frivolous, the Court or the jury, made up of reasonable North Dakota citizens, will most likely determine that to be the case and the attorney, who may have invested literally hundreds of hours of time, would receive nothing in fees since a percentage of nothing is nothing.

I would also suggest that most attorneys working on an hourly fee basis are simply not eager to take cases for which they can not accomplish a favorable outcome for their clients since those clients are less likely to be either happy or inclined to use the attorneys services again when they both lose and receive a substantial bill for legal services.

Separate and apart from the Association's position that there are already sufficient protections against "frivolous" litigation, the Associaiton is concerned that HB 1387 will have a serious and negative impact upon a significant segment of the citizens of this State.

In order to make an analogy, I will tell you that I don't do any criminal work. However, that doesn't prevent me from engaging in arguments on the rights of the "guilty" with my father-in-law. He is forever telling me that the "guilty" shouldn't have any rights. I repeatedly remind him, in addition to the fact that we don't always know at the outset whether they are "guilty", that you can't take away the rights of the "guilty" without taking away your rights as well.

In that context, I would suggest that it is probable that, if passed, HB 1387 would, in fact, result in a reduction in the number of lawsuits. However, it could do so at the considerable expense of many of your constituents who have very valid and meritorious claims but who are simply unwilling to take the risk, no matter how remote, that they may not prevail and therefore would be liable for the cost of the other party's attorney fees and costs.

There may already be some truth to the suggestion that those with some measure of wealth have more access to justice; but if HB 1387 is passed we may find that only those with either great wealth or those with so little wealth that they have nothing to lose can afford to seek justice.

It may be that it is easy to identify the extremes of the spectrum of litigation. It may be easy to identify the lawsuit that is obviously frivolous; and it may be equally easy to identify the lawsuit that is obviously warranted. The problem is that the vast majority of lawsuits, to differing degrees, fall somewhere in between those extremes. In many instances, it may be that the facts are legitimately in dispute or that it is not altogether clear how the law should be applied to those facts. In those cases, regardless of the outcome, they can be the subject of honest and justified disagreement without frivolous motives.

I submit to you that that is how we resolve our differences in a civilized fashion; and that is how the law evolves to meet society's changing needs. If the cost of preserving that right is the burder of significant legal fees, I submit that it is a burden worth carrying. If, in a misguided effort to eliminate a problem for which sufficient protections already exist, your actions have the practical effect of eliminating or reducing the access of the citizens of this State to the Courts to resolve their differences, I fear you will do serious damage to the respect which those citizens have for our legal system. That burden would be unbearable.

For these reasons, on behalf of the State Bar Association of North Dakota and the current and future clients of its members, I urge that this Committee give a "do not pass" recommendation to the full House.

I would be happy to attempt to answer any questions which you may have for me.

Thank you.

February 2, 1999

Dann Greenwood -1387

Statutes

---

§ 28-26-01. Attorney's fees by agreement--Exceptions--Awarding of costs and attorney's fees to prevailing party

1. Except as provided in subsection 2, the amount of fees of attorneys in civil actions must be left to the agreement, express or implied, of the parties.
2. In civil actions the court shall, upon a finding that a claim for relief was frivolous, award reasonable actual and statutory costs, including reasonable attorney's fees to the prevailing party. Such costs must be awarded regardless of the good faith of the attorney or party making the claim for relief if there is such a complete absence of actual facts or law that a reasonable person could not have thought a court would render judgment in their favor, providing the prevailing party has in responsive pleading alleged the frivolous nature of the claim. This subsection does not require the award of costs or fees against an attorney or party advancing a claim unwarranted under existing law, if it is supported by a good faith argument for an extension, modification, or reversal of the existing law.

---

§ 28-26-31. Pleadings not made in good faith

Allegations and denials in any pleadings in court, made without reasonable cause and not in good faith, and found to be untrue, subject the party pleading them to the payment of all expenses, actually incurred by the other party by reason of the untrue pleading, including a reasonable attorney's fee, to be summarily taxed by the court at the trial or upon dismissal of the action.

Rules

RULE 11. SIGNING OF PLEADINGS, MOTIONS AND OTHER PAPERS; REPRESENTATIONS TO COURT; SANCTIONS

(a) Signature. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, must be signed by the party. Each paper must contain the signer's address and telephone number, if any. If the person signing the paper is an attorney, the paper must also contain the attorney's State Bar Board identification number. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper must be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief,

formed after an inquiry reasonable under the circumstances,--

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or are reasonably based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How Initiated.

(A) By Motion. A motion for sanctions under this rule must be made separately from other motions or requests and must describe the specific conduct alleged to violate subdivision (b). The motion, brief, and any other supporting papers, must be served as provided in Rule 5, but must not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. The respondent shall have 10 days after a motion for sanctions is filed to serve and file an answer brief and other supporting papers. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule must be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) Inapplicability to Discovery. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

[Amended effective March 1, 1986; March 1, 1990; March 1, 1996; March 1, 1997.]

EXPLANATORY NOTE

Rule 11 was amended, effective March 1, 1986; March 1, 1990; March 1, 1996; March 1, 1997.

Rule 11 governs to the extent Rule 11 and > Rule 3.2, NDROC, conflict.

Rule 11 was revised, effective March 1, 1996, in response to the 1993 revision of > Rule 11, FRCivP. North Dakota's rule differs from the federal rule in the following respects: 1) North Dakota's rule requires attorneys to cite their State Bar Board identification number when signing papers; and 2) North Dakota's rule does not require allegations or denials to be specifically identified when immediate evidentiary support is lacking.

SOURCES: Procedure Committee Minutes of September 28-29, 1995, pages 2-3; April 27-28, 1995, pages 3-4; January 26-27, 1995, pages 8-10; September 29-30, 1994, pages 24-26; April 20, 1989, page 2; December 3, 1987, page 11; April 26, 1984, pages 25-26; January 20, 1984, pages 16-18; September 20-21, 1979, page 7; > Rule 11, FRCivP.

STATUTES AFFECTED:

SUPERSEDED: Sections 28-0720, 28-3001, NDRC 1943.

CROSS REFERENCE: Rule 11.1 (Nonresident Attorneys), NDROC; Sections 28-26-01 (Attorney's Fees by Agreement--Exceptions--Awarding Costs and Attorney's Fees to Prevailing Party), and 28-26-31 (Pleadings Not Made in Good Faith), NDCC.

RULE 16. PRETRIAL CONFERENCES; SCHEDULING; MANAGEMENT

(a) Pretrial Conferences; Objectives. In any action after issue is joined, the court in its discretion may, and upon written request of a party shall, direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences in advance of trial for such purposes as:

(1) expediting the disposition of the action;

(2) establishing early and continuing control so that the case will not be protracted because of lack of management;

(3) discouraging wasteful pretrial activities;

(4) improving the quality of the trial through more thorough preparation, and;

(5) facilitating the settlement of the case.

(b) Subjects for Consideration at Pretrial Conferences. At any conference under this rule consideration may be given, and the court may take appropriate action, with respect to:

(1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;

...

Rules of Prof.Conduct, Rule 3.1

RULE 3.1 MERITORIOUS CLAIMS AND CONTENTIONS

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

COMMENT

Allegations and denials in any pleading, made without reasonable cause and not in good faith, may subject the lawyers who plead them, and their clients, to prejudice. Such pleading is unprofessional conduct. A lawyer's signature on a pleading, motion or other paper certifies to the court that the lawyer has read it, that to the best of the lawyer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the

cost of litigation. A lawyer whose certification is found to have been false has misused the legal system and its procedures and has acted unprofessionally.

The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

Pleading and other documents prepared for and used in litigation on a client's behalf are not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence through discovery. Such documents are not frivolous even though the lawyer believes that the client's position ultimately might not prevail. A document is frivolous, however, if the client desires its preparation and use primarily for the purpose of harassing or maliciously injuring another, or where regardless of the good faith of the attorney or client responsible for the document there is such a complete absence of actual facts or law in support of the document that a reasonable person could not have thought that a tribunal would render a favorable judgment upon it.

The duties of a lawyer are also governed by Rule 11, N.D. Rules of Civil Procedure, and > sections 28-26-01 and > 28-26-31, N.D.C.C.

HOUSE JUDICIARY COMMITTEE
HB 1387

February 2, 1999

CHAIRMAN DeKREY AND COMMITTEE MEMBERS:

My name is Courtney Koebele. I'm appearing today on behalf of The North Dakota Trial Lawyers Association. We OPPOSE **HB 1387** and respectfully urge that you give it a DO NOT PASS.

First, North Dakota Law has many statutes that allow attorneys fees in certain cases. I have attached some examples of this to my testimony. For example, the "Veggie Libel" bill, or Section 32-44-02, passed last session, provides for civil liability for defamation of agricultural producers. The statute provides for actual reasonable attorney's fees if the agricultural producer is successful in the suit. If the bill presently before the committee would pass, then the unsuccessful agricultural producer would have to pay the defendant's attorney's fees.

Another example of statutory allowance of attorney's fees is the code section that requires the courts to award attorney's fees if a frivolous case has been brought. There are also rules in place that allow the award of attorney's fees if a lawsuit is brought for an improper purpose, or for the purposes to harass, cause unnecessary delay or needless increase in the cost of litigation. We believe that the legislature has seen fit to award attorney's fees in certain actions, and that the legislature should take each type of lawsuit on a case by case basis.

Second, this bill would have a chilling effect on the exercise of legal rights of individuals. If this bill would pass, then an individual with a potential legal action would have to be 100% sure of their success before filing the action. It would also stifle innovation in lawsuits, or establishing new causes of action. People who had good cases would not bring them because of the risk of paying double the amount of attorney's fees.

This bill could also be used to force the "little guy" to buckle under in big business lawsuits. A big business could sue a dealer over a contract term. If the local dealer doesn't concede, the big corporation could threaten the small dealer with their high priced lawyers as a bargaining tool. Even though there may be a good faith difference of interpretation of a contract, the little guy would have to give up because of the risk of the attorney's fees award.

In conclusion, we believe that the legislature has appropriately provided for attorney's fees awards in certain situations. The present law addresses the uniqueness in each cause of action. A blanket award of fees in all lawsuits, as proposed in this bill, is not necessary, and is unfair to both potential plaintiffs and defendants.
We respectfully request your **DO NOT PASS.** If you have any questions, I'll be happy to answer them. THANK YOU FOR YOUR TIME AND CONSIDERATION.

*11624 N.D. Code § **28-26-01**

WEST'S NORTH DAKOTA CODE
TITLE 28. JUDICIAL PROCEDURE, CIVIL
CHAPTER 28-26. COSTS AND DISBURSEMENTS

Current through the 1997 Regular Session of the 55th Legislative Assembly (1997)

§ **28-26-01**. Attorney's fees by agreement--Exceptions--Awarding of costs and attorney's fees to prevailing party

1. Except as provided in subsection 2, the amount of fees of attorneys in civil actions must be left to the agreement, express or implied, of the parties.
2. In civil actions the court shall, upon a finding that a claim for relief was frivolous, award reasonable actual and statutory costs, including reasonable attorney's fees to the prevailing party. Such costs must be awarded regardless of the good faith of the attorney or party making the claim for relief if there is such a complete absence of actual facts or law that a reasonable person could not have thought a court would render judgment in their favor, providing the prevailing party has in responsive pleading alleged the frivolous nature of the claim. This subsection does not require the award of costs or fees against an attorney or party advancing a claim unwarranted under existing law, if it is supported by a good faith argument for an extension, modification, or reversal of the existing law.

Search this disc for cases citing this section.

*11654 N.D. Code § **28-26-31**

WEST'S NORTH DAKOTA CODE
TITLE 28. JUDICIAL PROCEDURE, CIVIL
CHAPTER 28-26. COSTS AND DISBURSEMENTS

Current through the 1997 Regular Session of the 55th Legislative Assembly (1997)

§ **28-26-31**. Pleadings not made in good faith

Allegations and denials in any pleadings in court, made without reasonable cause and not in good faith, and found to be untrue, subject the party pleading them to the payment of all expenses, actually incurred by the other party by reason of the untrue pleading, including a reasonable attorney's fee, to be summarily taxed by the court at the trial or upon dismissal of the action.

Search this disc for cases citing this section.

Citation/Title
RCP Rule 11, RULE 11. SIGNING OF PLEADINGS, MOTIONS AND OTHER PAPERS; REPRESENTATIONS TO COURT; SANCTIONS

*28 **Rule 11**, N.D.R.Civ.P.

NORTH DAKOTA COURT **RULES**
NORTH DAKOTA **RULES** OF CIVIL PROCEDURE
III. PLEADINGS AND MOTIONS

Current with amendments received through 1-15-98.

RULE 11. SIGNING OF PLEADINGS, MOTIONS AND OTHER PAPERS; REPRESENTATIONS TO COURT; SANCTIONS

(a) Signature. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, must be signed by the party. Each paper must contain the signer's address and telephone number, if any. If the person signing the paper is an attorney, the paper must also contain the attorney's State Bar Board identification number. Except when otherwise specifically provided by **rule** or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper must be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or are reasonably based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

*29 (1) How Initiated.

(A) By Motion. A motion for sanctions under this **rule** must be made separately from other motions or requests and must describe the specific conduct alleged to violate subdivision (b). The

motion, brief, and any other supporting papers, must be served as provided in **Rule** 5, but must not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. The respondent shall have 10 days after a motion for sanctions is filed to serve and file an answer brief and other supporting papers. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this **rule** must be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this **rule** and explain the basis for the sanction imposed.

***30** (d) Inapplicability to Discovery. Subdivisions (a) through (c) of this **rule** do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of **Rules** 26 through 37.

[Amended effective March 1, 1986; March 1, 1990; March 1, 1996; March 1, 1997.]

EXPLANATORY NOTE

Rule 11 was amended, effective March 1, 1986; March 1, 1990; March 1, 1996; March 1, 1997.

Rule 11 governs to the extent **Rule 11** and **Rule** 3.2, NDROC, conflict.

Rule 11 was revised, effective March 1, 1996, in response to the 1993 revision of **Rule 11**, FRCivP. North Dakota's **rule** differs from the federal **rule** in the following respects: 1) North Dakota's **rule** requires attorneys to cite their State Bar Board identification number when signing papers; and 2) North Dakota's **rule** does not require allegations or denials to be specifically identified when immediate evidentiary support is lacking.

SOURCES: Procedure Committee Minutes of September 28-29, 1995, pages 2-3; April 27-28, 1995, pages 3-4; January 26-27, 1995, pages 8-10; September 29-30, 1994, pages 24-26; April 20, 1989, page 2; December 3, 1987, page **11**; April 26, 1984, pages 25-26; January 20, 1984, pages 16-18; September 20-21, 1979, page 7; **Rule 11**, FRCivP.

STATUTES AFFECTED:

SUPERSEDED: Sections 28-0720, 28-3001, NDRC 1943.

CROSS REFERENCE: **Rule** 11.1 (Nonresident Attorneys), NDROC; Sections 28-26-01 (Attorney's Fees by Agreement--Exceptions--Awarding Costs and Attorney's Fees to Prevailing Party), and 28-26-31 (Pleadings Not Made in Good Faith), NDCC.

*13596 N.D. Code § 34-01-20

WEST'S NORTH DAKOTA CODE
TITLE 34. LABOR AND EMPLOYMENT
CHAPTER 34-01. GENERAL PROVISIONS

Current through the 1997 Regular Session of the 55th Legislative Assembly (1997)

§ 34-01-20. Employer retaliation prohibited--Civil action for relief--Penalty

1. An employer may not discharge, discipline, threaten discrimination, or penalize an employee regarding the employee's compensation, conditions, location, or privileges of employment because:
   a. The employee, or a person acting on behalf of an employee, in good faith, reports a violation or suspected violation of federal or state law or rule to an employer or to a governmental body or law enforcement official.
   b. The employee is requested by a public body or official to participate in an investigation, hearing, or inquiry.
   c. The employee refuses an employer's order to perform an action that the employee believes violates state or federal law or rule or regulation. The employee must have an objective basis in fact for that belief and shall inform the employer that the order is being refused for that reason.
2. An employer who willfully violates this section is guilty of an infraction.
3. An employee asserting a violation of this section may bring a civil action for injunctive relief or actual damages, or both, within ninety days after the alleged violation, completion of proceedings under subsection 4, or completion of any grievance procedure available to the employee under the employee's collective bargaining agreement, employment contract, or any public employee statute, rule, or policy, whichever is later. If the court determines that a violation has or is occurring under this section, the court may order, as the court deems appropriate, reinstatement of the employee, back pay for no more than two years after the violation, reinstatement of fringe benefits, temporary or permanent injunctive relief, or any combination of these remedies. Interim earnings or amounts earnable with reasonable diligence by the employee, from the same employer, must reduce back pay otherwise allowable. In any action under this section, the court may **award** reasonable **attorneys' fees** to the prevailing party as part of the costs of litigation. An employee whose collective bargaining agreement, employment contract, or public employee rights provides a process through which recourse for conduct prohibited by subsection 1 is available must exercise that process to completion before commencing an action under this subsection, and if that process provides for judicial review by statutory appeal, then recourse under this subsection is not available.

*13597 4. The department of labor may receive complaints of violations of this section and attempt to obtain voluntary compliance with this section through informal advice, negotiation, or conciliation. An employee is not prohibited from filing, or required to file, a complaint with the department of labor under this subsection before proceeding under other provisions of this section.

Amended by L.1997, c. 291, § 1, eff. Aug. 1, 1997.

Search this disc for cases citing this section.

*13560 N.D. Code § **32-44-02**

WEST'S NORTH DAKOTA CODE
TITLE 32. JUDICIAL REMEDIES
CHAPTER 32-44. DEFAMATION OF AGRICULTURAL PRODUCTS AND MANAGEMENT PRACTICES

Current through the 1997 Regular Session of the 55th Legislative Assembly (1997)

§ **32-44-02**. Civil liability for defamation of agricultural producers

A person who willfully or purposefully disseminates a false and defamatory statement, knowing the statement to be false, regarding an agricultural producer or an agricultural product under circumstances in which the statement may be reasonably expected to be believed and the agricultural producer is damaged as a result, is liable to the agricultural producer for damages and other relief allowed by law in a court of competent jurisdiction, including injunctive relief and compensatory and exemplary damages. If it is found by a court or jury that a person has maliciously disseminated a false and defamatory statement regarding an agricultural product or agricultural producer, the agricultural producer may recover up to three times the actual damages proven and the court must order that the agricultural producer recover costs, disbursements, and actual reasonable attorneys' fees incurred in the action.

Added by L.1997, c. 288, § 2, eff. Aug. 1, 1997.

Search this disc for cases citing this section.

Richard Hammond

I object to the passage of House Bill 1387. Bill 1387 will only make the legal system even less available to citizens of the State than it is now. In passing this bill you are making several unfounded assumptions. You are assuming that the court's decisions are based on applicable law. You are assuming that the prevailing party was entitled to prevail. You are assuming that the legal system functions. Nothing is further from reality. In today's court system, decisions are based upon the personal opinions, likes and dislikes of our judges. The mechanics of the procedural legal chess game are far more important that the merits of any case. Judges are accountable to no one. They are not even responsible for their decisions. Today, litigants could stand on the courthouse steps and flip a coin and get a decision that will have just as much relation to law as the decisions rendered by our judges. Fee shifting, in cases where the verdict is simply wrong, will only add insult to injury. The State must first have a legal system that works. One that renders decisions based on law. Only then could fee shifting be considered. This bill is premature.

1:00 Room
Prairie